

recordkeeping requirements, Volatile organic compounds.

40 CFR Part 81

Air pollution control.

Authority: 42 U.S.C. 7401-7671q.

Dated: April 21, 1995.

Valdas V. Adamkus,
Regional Administrator.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 950410098-5098-01; I.D. 030395A]

RIN 0648-AH19

Taking and Importing of Marine Mammals; Deterrence Regulations and Guidelines

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule; request for comments.

SUMMARY: The Marine Mammal Protection Act (MMPA) Amendments of 1994 (the Amendments) provided new authority to citizens of the United States to deter marine mammals from: Damaging fishing gear and catch; damaging private property; endangering public safety; or damaging public property. The Amendments require NMFS to publish a list of guidelines for use in safely deterring marine mammals and to prohibit deterrence measures that have a significant adverse impact on marine mammals. This proposed rule sets forth preliminary versions of the guidelines and prohibitions, and seeks public comment upon which to refine them.

DATES: Comments must be received no later than July 5, 1995.

ADDRESSES: Written comments on the proposed rule should be addressed to Dr. William W. Fox, Jr., Director, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226. A copy of the Environmental Assessment (EA) and list of experts may be obtained by writing to this address or by telephoning one of the contacts listed below.

FOR FURTHER INFORMATION CONTACT: Tom Eagle or Ken Hollingshead Office of

Protected Resources at (301) 713-2322; Doug Beach, Northeast Regional Office at (508) 281-9254; Jeff Brown, Southeast Regional Office at (813) 893-3366; Irma Lagomarsino, Southwest Regional Office at (310) 980-4020; Joe Scordino, Northwest Regional Office at (206) 526-6143; or Steve Zimmerman, Alaska Regional Office at (907) 586-7510.

SUPPLEMENTARY INFORMATION:

Background

The 1994 Amendments to the MMPA amended section 101(a)(4) to authorize fishers to deter marine mammals from damaging fishing gear or catch, property owners to deter marine mammals from damaging property, government officials to deter marine mammals from damaging public property, and anyone to deter marine mammals from endangering personal safety, so long as such acts of deterrence do not result in the serious injury or mortality of a marine mammal. Section 101(a)(4) of the MMPA directs the NMFS to develop and publish guidelines for use in safely deterring marine mammals and to prohibit deterrence measures determined to have a significant adverse effect on the animals. Section 101(a)(4)(B) directs NMFS to recommend specific measures which may be used to nonlethally deter marine mammals listed as endangered or threatened under the Endangered Species Act of 1973 (ESA). Such measures must be consistent with the provisions of the ESA. Actions to deter marine mammals consistent with such guidelines or specific measures would not be a violation of the MMPA.

The guidelines and prohibitions of this proposed rule would apply only with respect to marine mammal species which are not listed under the ESA. Specific recommended measures of nonlethal deterrence for ESA-listed species will be the subject of a separate rule. In the meantime, the use of deterrence measures upon marine mammal species listed under the ESA would remain prohibited.

Under the MMPA's section 114 Interim Exemption Program, commercial fishers were authorized, in certain situations, to deter marine mammals, to take them by harassment, and to intentionally kill them to protect fishing gear and catch. The 1994 Amendments to the MMPA changed this by prohibiting intentional killing and authorizing only acts of deterrence that do not cause serious injury or mortality to marine mammals. Furthermore, intentional lethal taking is now explicitly prohibited, except in the defense of human life, by new sections 101(c) and 118(a)(5) (see 60 FR 6036,

February 1, 1995). Taken together, these new provisions effect a marked change in how some fisheries legally interact with marine mammals. The deterrence guidelines and prohibitions of this proposed rule would facilitate that change, allowing the use of effective deterrence measures while limiting injurious force.

New section 101(a)(4) of the MMPA authorizes the intentional interaction of private citizens with marine mammals. Recreational fishers may now deter marine mammals from damaging fishing gear or catch; property owners or their agents may now deter marine mammals from damaging their property; and the general public may now deter marine mammals from endangering personal safety, provided such deterrence does not cause a marine mammal's death or serious injury. The proposed guidelines and prohibited measures set forth activities that are not likely to cause a marine mammal death or serious injury and specifically prohibit activities determined, using the best scientific information available, to have a significant adverse effect on marine mammals. Actions by the public to deter non-ESA listed marine mammals consistent with such guidelines would not be a violation of the MMPA.

Because Federal, state, and local government officials had the authority to take marine mammals prior to the 1994 MMPA Amendments if doing so was for the protection or welfare of the animals or for the protection of the public health and welfare, and, because regulations governing such takings, which take into account the special training and experience levels of such officials, are already in place at 50 CFR 216.22, the proposed guidelines and prohibitions would not apply to acts of deterrence by government officials.

Guidelines

The proposed guidelines for use in safely deterring marine mammals would provide information on acceptable types of deterrence actions. The proposed guidelines incorporate caution and restraint in their deterrence methods and should minimize marine mammal injuries, if followed. The broad application of these proposed guidelines to a wide range of marine mammal species, interaction situations, and highly variable marine mammal behavioral reactions requires that the guidelines be general. They would give direction to ensure that deterrence actions do not result in the serious injury or death of a marine mammal.

"Passive" deterrence measures, those that prevent a marine mammal from gaining access to property, people, or

fishing gear or catch, would be acceptable. Predator nets, rigid fencing, or other fixed barriers could be placed to exclude marine mammals from the immediate area of the subject property, persons, or fishing gear or catch. Such "passive" deterrence devices could be used, provided they do not increase the risk of entanglement or serious injury or death of a marine mammal.

"Preventive" deterrence measures, those taken to dissuade a marine mammal from beginning to interact with property, people, or fishing gear or catch, would also be acceptable. For example, underwater acoustic devices that generate sounds known to be annoying to marine mammals could be used, as could certain light explosives to startle pinnipeds and to disrupt their approaches to property, people, or fishing gear or catch. Boat hazing (patrolling a net or an area in a small boat and deterring marine mammals with boat noise or by blocking their approach at the surface) could be used provided it did not result in the serious injury or death of a marine mammal.

Some "reactive" deterrents, those active measures taken with the intent of stopping a dangerous or damaging interaction, also would be acceptable. "Reactive" measures may require the most assertive deterrent actions. Some examples of generally acceptable reactive measures that could be used without causing an animal serious injury or death are prodding a marine mammal with blunt poles, pushing or herding an animal with plywood or canvas, or spraying water at an animal. Noisemakers and, for seals and sea lions, some light explosives, could also be used.

Four additional instructions would aid in the proper use of active measures in preventive or reactive situations. Acts of deterrence should not: (1) Result in a separation of a female marine mammal from its unweaned offspring; (2) break the skin of a marine mammal; (3) be directed at the head or eyes of a marine mammal; or (4) be used on pinnipeds hauled out on unimproved private property (i.e. a rock, ledge, or beach).

The deterrence measures described as examples above should be used with great caution. Any act of deterrence—including the example measures—that results in the serious injury or death of a marine mammal would be unacceptable and would violate the MMPA. Also, the above lists of examples should not be considered exhaustive. Any action that is not specifically prohibited and is consistent with the guidelines could be taken to deter marine mammals, so long as the

action does not result in the serious injury or death of a marine mammal.

Prohibitions

Section 101(a)(4)(C) authorizes NMFS to prohibit such forms of deterrence that it determines, using the best scientific information available, after notice and opportunity for public comment, to have a significant adverse effect on marine mammals. NMFS proposes to prohibit the use of firearms or other devices that propel injurious projectiles. The use of explosives on cetaceans also would be prohibited, and only seal bombs or lesser explosives could be used for deterring pinnipeds. Seal bombs are explosive pest control devices (formerly designated by the Department of Transportation as Class C Pest Control Devices, now designated as Explosive Pest Control Device 1.4E NA-0412) in common use in some commercial fisheries. Further, the translocation of marine mammals—the capture and removal to another site—would be prohibited (except by Federal, state, and local officials as authorized by section 109(h) of the MMPA) as would the use of any substance intended for consumption by marine mammals. Specific justifications for the proposed prohibition of these deterrence measures follow.

Firearms and Devices That Propel Injurious Projectiles

NMFS proposes to prohibit from use as a marine mammal deterrent any firearm or any device used to propel an object designed for injurious effect including crossbows, spearguns, bangsticks, archery gear, harpoons, javelins, and spears. Firearms have been used to lethally deter depredating marine mammals in several fisheries; for example, killer whales in the Alaskan sablefish longline/setline fisheries, California sea lions in the Oregon/California salmon troll fishery, and harbor seals and gray seals in the Gulf of Maine salmon pen-aquaculture. Devices that propel injurious projectiles cannot generally be used for deterrence without having a significant adverse effect on the targeted marine mammals, and would therefore be prohibited.

Explosives

Explosives have been used to herd and deter marine mammals for at least 30 years. The most common explosives that have been used are seal bombs, which explode 5 to 8 meters below the water's surface, causing a pressure wave that startles the targeted animal and temporarily deters it from an area. In 1989, NMFS' Southwest Fisheries

Science Center (SWFSC, 1990)¹ studied the potential for injury to dolphins from seal bomb use in the tuna purse seine fishery. The reports concluded that

all types of seal bombs now known to be in use *** are capable of inflicting slight to moderately severe injury when detonated at least within 0.5 m of a dolphin (Myrick et al., 1990b).

The most potent devices of this type could "cause additional dolphin mortality when detonated at close range." (Myrick et al., 1990a).

Because of the known adverse effects and the difficulties in effectually modifying or regulating their use, seal bombs were prohibited from use in the eastern tropical Pacific yellowfin tuna purse seine fishery (55 FR 11580, March 29, 1990). For the same reasons, NMFS proposes to prohibit use of explosives against cetaceans in deterrence applications.

Numerous studies of deterrent effectiveness of seal bombs on pinnipeds have noted no apparent physical injury to a pinniped. While internal injuries and hearing loss would not be apparent, the return of normal seal and sea lion behavior and the failure of seal bombs as permanent deterrents indicate that the effect of the explosives is not significantly adverse (NMFS-Washington Department of Wildlife (WDW), 1989; Geiger and Jeffries, 1986; NMFS-WDW, 1994).

Available information also indicates that the effects of seal bombs on other species in the marine environment are insignificant. Two reports attribute a few fish mortalities to repeated use of explosives in a small area (Myrick et al., 1990a; NMFS-WDW, 1989). Explosives that detonate above the water's surface could result in minor disruptions in the behavior of birds and terrestrial species but these effects are considered to be negligible. Because there is no evidence that seal bombs and light fireworks used as deterrents present a significant adverse effect to pinnipeds or their environment, NMFS does not propose to prohibit their use on pinnipeds.

Translocation

Translocation (the capture and relocation), of wild marine mammals is a risky task undertaken occasionally by experts in animal stranding situations and infrequently in the course of research. Each phase of translocation—the capture, detainment, transport, and release—presents opportunity for significant behavioral and physiological injury to the animal. Therefore, NMFS

¹ Complete bibliographic information available in the Environmental Assessment and provided upon request. (See ADDRESSES.)

proposes to prohibit translocation as a method of deterrence.

Tainted Bait and Other Consumables

NMFS proposes to prohibit the use of tainted bait, poisons, or any other object intended for consumption by a marine mammal for the purpose of deterrence. The practice of taste aversion involves placing substances in bait fish to induce physical discomfort when it is consumed. Even for scientists and wildlife management professionals, control of dosage amounts is difficult to manage, and attempts by the general public would likely involve an injurious amount being ingested, causing a significant adverse effect. The tainted vomitus and excrement of marine mammals could also have some impact on the food web. Moreover, non-target species could not be kept from ingesting the substances. For these reasons, substances intended for consumption by a marine mammal would be prohibited as a method of marine mammal deterrence².

Consultation

Section 101(a)(4) of the MMPA requires NMFS to consult with appropriate experts on the implementation of the deterrence provisions. NMFS has compiled a list of individuals believed to have experience and knowledge of interactions with marine mammals and/or the use of deterrence devices. These individuals have been sent a copy of this proposed rule and invited by NMFS to submit comments on this proposed rule. The list of experts is available upon request (see ADDRESSES).

National Environmental Policy Act

The Assistant Administrator for Fisheries, NOAA (AA) has determined, based upon an EA prepared under the National Environmental Policy Act that implementation of these guidelines and prohibitions would not have a significant impact on the human environment. As a result of this determination, an environmental impact statement is not required. A copy of the EA is available upon request (see ADDRESSES).

Classification

This action has been determined to be not significant for purposes of E.O. 12866. In addition, the Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Small Business Administration that this

proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities as defined under the Regulatory Flexibility Act. Although some small waterfront and water-related businesses may be impacted by this rule, any economic impacts that accrue are expected to be positive since the rule, if implemented, will authorize property owners to legally take certain non-lethal measures against marine mammals in order to protect either private property, themselves or their customers.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Imports, Indians, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Dated: April 28, 1995.

Gary Matlock,

Program Management Officer, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. In subpart C, § 216.29 is added to read as follows:

§ 216.29 Marine mammal deterrence.

(a) *Definitions.* For the purposes of this paragraph, "catch" means an aquatic species that is attached, hooked, ensnared, netted or otherwise under the control of the owner or operator of that fishing gear.

(b) *Deterrence measure authorization.* (1) Except as provided in paragraph (d) of this section, measures consistent with the general guidelines in paragraph (c) of this section, may be taken:

(i) By the owner of fishing gear or catch, either commercial or recreational, or an employee or agent of such owner to deter a marine mammal (other than species listed as endangered or threatened under the Endangered Species Act) from damaging gear or catch so long as such measures do not result in the death or serious injury of a marine mammal.

(ii) By the owner of other private property, or an agent, bailee, or

employee of such owner, to deter a marine mammal (other than species listed as endangered or threatened under the Endangered Species Act) from damaging private property so long as such measures do not result in the death or serious injury of a marine mammal.

(iii) By any person to deter a marine mammal from endangering personal safety so long as such measures do not result in the death or serious injury of a marine mammal. Furthermore, it shall not be a violation of the Act to take a marine mammal, even lethally, if such taking is imminently necessary in self-defense or to save the life of a person in immediate danger, provided such taking is reported to the Assistant Administrator within 48 hours.

(2) Federal, state or local government officials and employees may, consistent with § 216.22 of this chapter, deter a marine mammal from damaging public or private property.

(c) *Guidelines for safe deterrence.* The following measures are acceptable for the deterrence of marine mammals.

(1) Passive deterrence measures that preclude a marine mammal from accessing or interacting with persons, property, or fishing gear or catch may be used in the immediate vicinity of those persons, property, or fishing gear or catch that is to be protected. Nets, fences, or other types of physical barriers may be used provided the potential for marine mammals to become entangled is not increased.

(2) Active deterrence measures (including both "preventive" and "reactive" deterrence measures) that dissuade a marine mammal from interacting with persons, property, fishing gear or catch or that cause a marine mammal to cease its interaction with persons, property, or fishing gear or catch should not:

(i) Separate a female and its offspring;

(ii) Break the skin of an animal;

(iii) Be directed at the head or eyes of an animal; or

(iv) Be used on pinnipeds hauled out on unimproved private property. Active deterrence measures that may be used include, but are not limited to, mechanical or electrical noisemakers, water sprayed from a hose, blunt objects to prod animals, large shielding objects (wood, metal or fabric) to herd animals, and hazing actions by boat operators.

(d) *Prohibited deterrence measures.* The following forms of deterrence are prohibited from use for the deterrence of marine mammals:

(1) Use of any firearm, or other device used to propel an object resulting in, or possible to result in, injury including, without limitation, crossbows,

² In addition, the practice of feeding marine mammals in the wild is prohibited by regulation (50 CFR 216.3).

spearguns, bangsticks, archery gear, harpoons, javelins, and spears;

(2) Use of any explosive device for use on cetaceans (dolphins and whales), and any device of explosive power greater than that of a seal bomb (USDOT Explosive Pest Control Device 1.4E NA-0412, formerly Class C) for use on pinnipeds (seals and sea lions);

(3) Translocation of any marine mammal;

(4) Use of any tainted bait, poison, or any other object or substance intended for consumption by a marine mammal.

(e) *Acceptable measures for deterrence of ESA-listed species*
[Reserved].

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